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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CHECKER VAN & STORAGE OF OAKLAND, INC.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

---

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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BRIEF FOR THE APPELLEE

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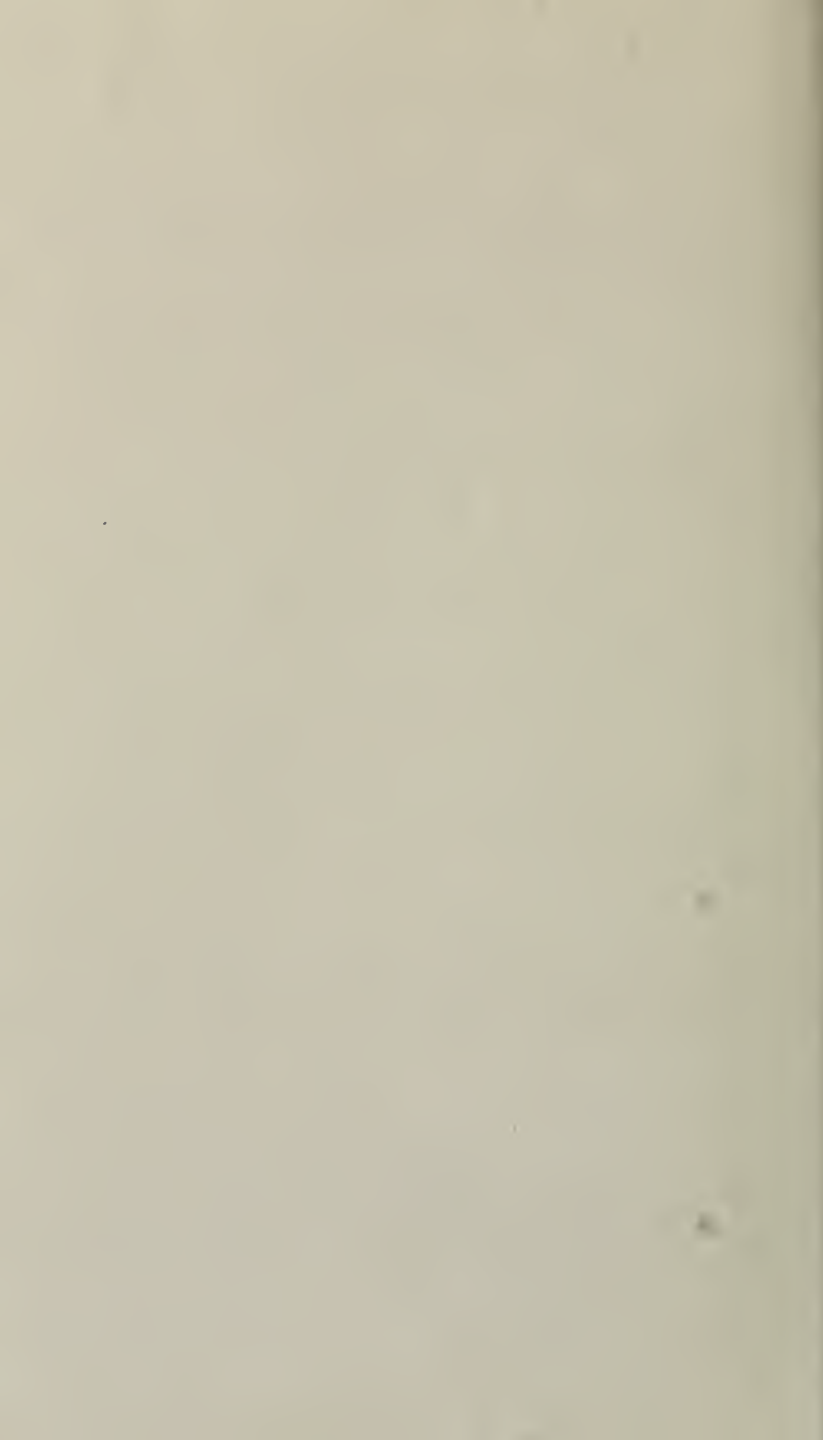
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 21,961

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CHECKER VAN & STORAGE OF OAKLAND, INC.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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BRIEF FOR THE APPELLEE

---

JURISDICTIONAL STATEMENT

This action was brought by Checker Van & Storage of Oakland, Inc. (hereinafter "Checker"), appellant herein, for a declaratory judgment against the United States (R. 1). 1/ The complaint sought a declaration that Checker was not liable to the United States for an amount in excess of \$10,000 which the United States asserted was due under a contract between the parties (R. 1-3).

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L/ "R" citations are to the Transcript of Record prepared by  
the clerk.

The complaint alleged that the district court had jurisdiction over this suit against the United States under the Declaratory Judgment Act, 28 U.S.C. 2201-2202; Section 10 of The Administrative Procedure Act, 5 U.S.C. (Supp. II) 701-704; The Wunderlich Act, 41 U.S.C. 321, 322; 28 U.S.C. 1331; and Rule 57, Federal Rules of Civil Procedure (R. 1). In resisting the motion of the United States to dismiss the complaint for lack of jurisdiction (R. 41), Checker also asserted jurisdiction for this claim in excess of \$10,000 under the Tucker Act, 28 U.S.C. 1346(a)(2) (R. 48).

The district court granted the motion of the United States to dismiss (R. 57), holding that there existed no basis of jurisdiction over this suit against the United States (R. 55-56).

Checker filed a timely notice of appeal (R. 58). The jurisdiction of this Court is invoked under 28 U.S.C. 1291.

#### COUNTERSTATEMENT OF THE CASE

Checker, a public warehouse company, entered into contracts with the United States for the storage of goods of military personnel at approved warehouses at 608 Franklin Street, and 325 Grove Street, Oakland, California (R. 2, 8, 28). On or about March 2, 1964, goods held by Checker under those contracts were damaged by a fire while stored in a warehouse at 12th and Pine Streets, Oakland, California, an area which had not been approved for storage. (R. 29) Thereafter, the Contracting Officer made a determination under the "disputes" clause of the contracts that Checker was liable for the damage in an amount in excess of \$10,000 (R. 2).



That decision was appealed by Checker to the Armed Services Board of Contract Appeals (the ASBCA) (R. 2). After a hearing on the merits (R. 27), the ASBCA, in two decisions, determined that Checker was liable under its contract, on the basis of the facts shown, as a result of its storage of goods in an unauthorized location (R. 27-49). Those decisions did not deal with the amount of the damages, however (R. 27) and that question remained pending before the ASBCA. We are advised that, at the time of this writing, the ASBCA has not yet determined the damages for which Checker is liable.

On October 4, 1966, Checker brought this action, alleging in its complaint that the United States asserted, in accordance with the decision of the ASBCA, that Checker was liable for the loss of the goods and had threatened to cancel Checker's contracts with the United States if payment were not made (R. 2-3). It did not assert that payment of any specified amount had been demanded or that any threats to cancel contracts before a final determination of the amount due had been made. 2/

The relief prayed for was a declaration that Checker was not liable for the amount, in excess of \$10,000, which the United

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2/ Indeed, we are advised by the Department of the Army that, by letter of 7 April 1966 from John B. Hook, Esquire, counsel for Checker's insurance carrier, Checker entered into a deferment agreement by which it agreed to pay whatever amounts were found by ASBCA to be due. In turn the Army, by letter of 20 April 1966, agreed to defer collection until the ASBCA decision and not to place Checker on the List of Contractors Indebted To The United States. If Checker desires, we shall be pleased to furnish this correspondence to the Court to supplement the record.

States asserted was due under its contract (R. 3). Jurisdiction, at various times, was asserted for this suit against the United States under The Declaratory Judgment Act, 28 U.S.C. 2201-2202 (R. 1); Section 10 of The Administrative Procedure Act, 5 U.S.C. (Supp. II) 701-704 (R. 1); The Wunderlich Act, 41 U.S.C. 321, 322 (R. 1); Rule 57, F.R. Civ. P. (R. 1); 28 U.S.C. 1331 (R. 1); and the Tucker Act, 28 U.S.C. 1346(a)(2) (R. 48).

The United States moved to dismiss the action on the ground that it was an unconsented suit against the United States, which the court had no jurisdiction to entertain (R. 41). The district court granted that motion, pointing out that none of the bases of jurisdiction asserted by Checker granted consent to this suit (R. 54-56), and entered judgment dismissing the action (R. 57). From that order, Checker has prosecuted this appeal.

#### STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2), provides:

§ 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: \* \* \*.

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Declaratory Judgment Act, 28 U.S.C. 2201, 2202, provides:

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Section 10 of The Administrative Procedure Act, now recodified as 5 U.S.C. (Supp. II) 702-704, provides in relevant part:

§ 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. \* \* \*.

ARGUMENT

Summary

This action seeks, in effect, to restrain the United States from collection of a debt owed to it by Checker; either by forcing the Government to pay Checker the money it would otherwise withhold after the amount of liability is ascertained, or by prohibiting it from adding Checker's name to the List of Contractors Indebted to the United States. We demonstrate herein that this is plainly an unconsented suit against the United States, which cannot be maintained. We show further that Checker, in this suit, is seeking to bypass the plain, simple, and adequate remedy which has been provided by Congress. That remedy, designed by Congress to protect the Treasury from the delays possible from the dilatory prosecution of suits of this sort, is the payment by Checker of the money ultimately found by the ASBCA to be due, and suit in the Court of Claims. Thus, the district court correctly held that it had no jurisdiction to maintain this action.



THIS IS AN UNCONSENTED SUIT AGAINST THE  
UNITED STATES WHICH WAS PROPERLY DIS-  
MISSED FOR LACK OF JURISDICTION.

By this suit, Checker seeks to prevent the United States from proceeding to collect Checker's indebtedness to it once the precise amount of the debt has been determined by the ASBCA. We show herein that Checker's dissatisfaction with the traditional method of review 3/ does not create jurisdiction in the district court to entertain this action. Rather, Checker, like every other person seeking to extract funds from the common weal by depleting the Treasury, must allow the United States to withhold the amounts found to be due or voluntarily pay them, and seek their recovery in the Congressionally authorized manner - by suit in the Court of Claims. 4/ All of Checker's objections to the determination of the ASBCA may be raised in that suit.

As a background for the examination of this case, of course, "we may lay the postulate that without specific statutory consent, no suit may be brought against the United States." United States v. Shaw, 309 U.S. 495, 500. See also United States v. Sherwood, 312 U.S. 584; Mine Safety Corporation v. Forrestal, 326 U.S. 371; Hawaii v. Gordon, 373 U.S. 57; Balistrieri v. United States, 303 F. 2d 617, 619, (C.A. 7). In the circumstances, it is plain that the United States has never consented

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3/ The method of review already agreed to by its insurance carrier.

4/ Or, if there is not enough money yet available due on the Contract to allow the Government to withhold to recover the monies due, it may be necessary for the United States to bring suit against Checker for the money due. All Checker's objections may be raised in defense of such a suit. 41 U.S.C. 321, 322.

to have a suit of this nature, which seeks to prevent it from collecting a debt which has been found to be due it from plaintiff, maintained in its courts. We now examine each of the alleged sources of jurisdiction for this action proposed by Checker, and demonstrate that none of them constitutes a consent to this suit.

1. The Declaratory Judgment Act plainly is not a consent by the United States to suit. For, as this Court has pointed out, that act does not create new jurisdiction in the Federal district courts, but merely adds an additional remedy in those cases where a district court already has jurisdiction. Wells v. United States, 280 F. 2d 275 (C.A. 9). By the passage of that Act, Congress "enlarged the range of remedies available in the federal courts, but did not extend their jurisdiction." Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 671. See also Schilling v. Rogers, 363 U.S. 666, at 677, where the court stated:

[T]he Declaratory Judgment Act is not an independent source of federal jurisdiction. \* \* \*. The availability of such relief presupposes the existence of a judicially remediable right. No such right exists here.

This Court has regularly recognized that the Declaratory Judgment Act does not operate as a consent by the United States to suit, United States v. Preston, 352 F. 2d 352 (C.A. 9); State of Nevada v. United States, 279 F. 2d 699 (C.A. 9); Wells v. United States, 280 F. 2d 275 (C.A. 9), and that is, of course, the general rule. E.g. Clay v. United States, 210 F. 2d 686, 93 U.S. App. D.C. 119 (C.A.D.C.), certiorari denied, 347 U.S.

27; Blanc v. United States, 244 F. 2d 708 (C.A. 2), certiorari denied, 355 U.S. 874; Anderson v. United States, 229 F. 2d 675 (C.A. 5); Lynn v. United States, 110 F. 2d 586, (C.A. 5). Malistrieri v. United States, 303 F. 2d 617 (C.A. 7); Chournos v. United States, 335 F. 2d 918 (C.A. 10).

2. Nor does the Tucker Act, 28 U.S.C. 1346(a)(2), operate as a consent by the United States to this suit in the district court. The Tucker Act, of course, allows suit on a contract claim by a plaintiff to recover funds in the hands of the Government. But that Act allows suit only after the money involved is in the Treasury, thus insuring that suits of this nature will not, through dilatory prosecution, keep funds otherwise due the Treasury for the common good in private hands for unconscionably long periods of time. For a suit of this nature is, in actuality, an attempt to restrain the Government from acting to collect a debt which has been determined to be due and owing. And such a suit is not proper under the Tucker Act. United States v. Jones, 31 U.S. 1; Wells v. United States, 280 F. 2d 275 (C.A. 9); Blanc v. United States, 244 F. 2d 708 (C.A. 2); certiorari denied, 355 U.S. 874; Lynn v. United States, 110 F. 2d 586 (C.A. 5). See also 6A Moore, Federal Practice ¶57.21[1].

But even if the Tucker Act allowed suit for declaratory relief against the United States, which it does not, this action would have to fail, for the complaint expressly alleges that the amount in question is in excess of \$10,000.00 (R. 1). The Act itself only allows suit in the district courts for any "civil action or claim against the United States, not exceeding \$10,000

in amount" 28 U.S.C. 1346(a)(2). Since this action involves a civil action or claim exceeding \$10,000 in amount, it could only be brought in the Court of Claims in any event. Cf. Barnes v. United States, 241 F. 2d 252 (C.A. 9); United States v. Tacoma Oriental S.S. Co., 86 F. 2d 363 (C.A. 9).

3. Section 10 of The Administrative Procedure Act does not grant the district court jurisdiction to entertain this suit either. For that Act allows review only in courts "of competent jurisdiction" 5 U.S.C. (Supp. II) 703. It is quite clear that that Act may not "be deemed an implied waiver of all governmental immunity from suit", Blackmar v. Guerre, 342 U.S. 512, 516.

As stated by the Second Circuit:

The purpose of § 10 is to define the procedure and manner of judicial review of agency action, rather than to confer jurisdiction upon the courts. Moreover, § 10(c) of the Act itself excepts from review under the section agency action for which there is some "other adequate remedy in any court." Suit under the Tucker Act in the Court of Claims provides an adequate remedy for appellant and precludes his reliance on § 10.

Ove Gustavsson Contracting Co. v. Floete, 278 F. 2d 912, 914 certiorari denied, 364 U.S. 894. See also Aktiebolaget Bofors v. United States, 194 F. 2d 145, 90 U.S. App. D.C. 92 (C.A.D.C. Kansas City Power & Light Co. v. McKay, 225 F. 2d 924, 96 U.S. App. D. C. 273 (C.A.D.C.), certiorari denied, 350 U.S. 884; Commonwealth of Massachusetts v. Connor, 248 F. Supp. 656 (D. Mass.), affirmed on opinion of district court, 366 F. 2d 778 (C.A. 1); Chournos v. United States, 335 F. 2d 918 (C.A. 10);



Cotter Corp. v. Seaborg, 370 F. 2d 686 (C.A. 10).

Consequently, it is plain that the United States has never consented to be sued in this type of action. 5/

#### CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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5/ Plainly 28 U.S.C. 1331 and Rule 57, F.R. Civ. P., the only remaining grounds for jurisdiction asserted, do not confer jurisdiction over this suit. Indeed, the assertion has apparently been abandoned in this Court. The Wunderlich Act, 41 U.S.C. 321, 322, merely specifies the challenges to the determination of the ASBCA which Checker can raise in its Court of Claims action or by defense to an action by the Government.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

*Robert C. McDiarmid*

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AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA     }  
CITY OF WASHINGTON       } SS.

ROBERT C. McDIARMID, being duly sworn, deposes and says:

That on January 16, 1968, he caused three copies of the foregoing Brief for the Appellee to be served by air mail, postage prepaid, upon counsel for appellant:

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*Robert C. McDiarmid*

ROBERT C. McDIARMID,  
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Washington, D. C. 20530.

Subscribed and Sworn to before me  
this 16th day of January, 1968.  
[Seal]

*Constance J. [Signature]*  
NOTARY PUBLIC

My Commission expires April 14, 1972.